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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1406

NORMAN F. DACEY & NORMAN F. DACEY, doing business as NATIONAL ESTATE PLANNING COUNCIL,
Petitioners,

v.

NEW YORK COUNTY LAWYERS' ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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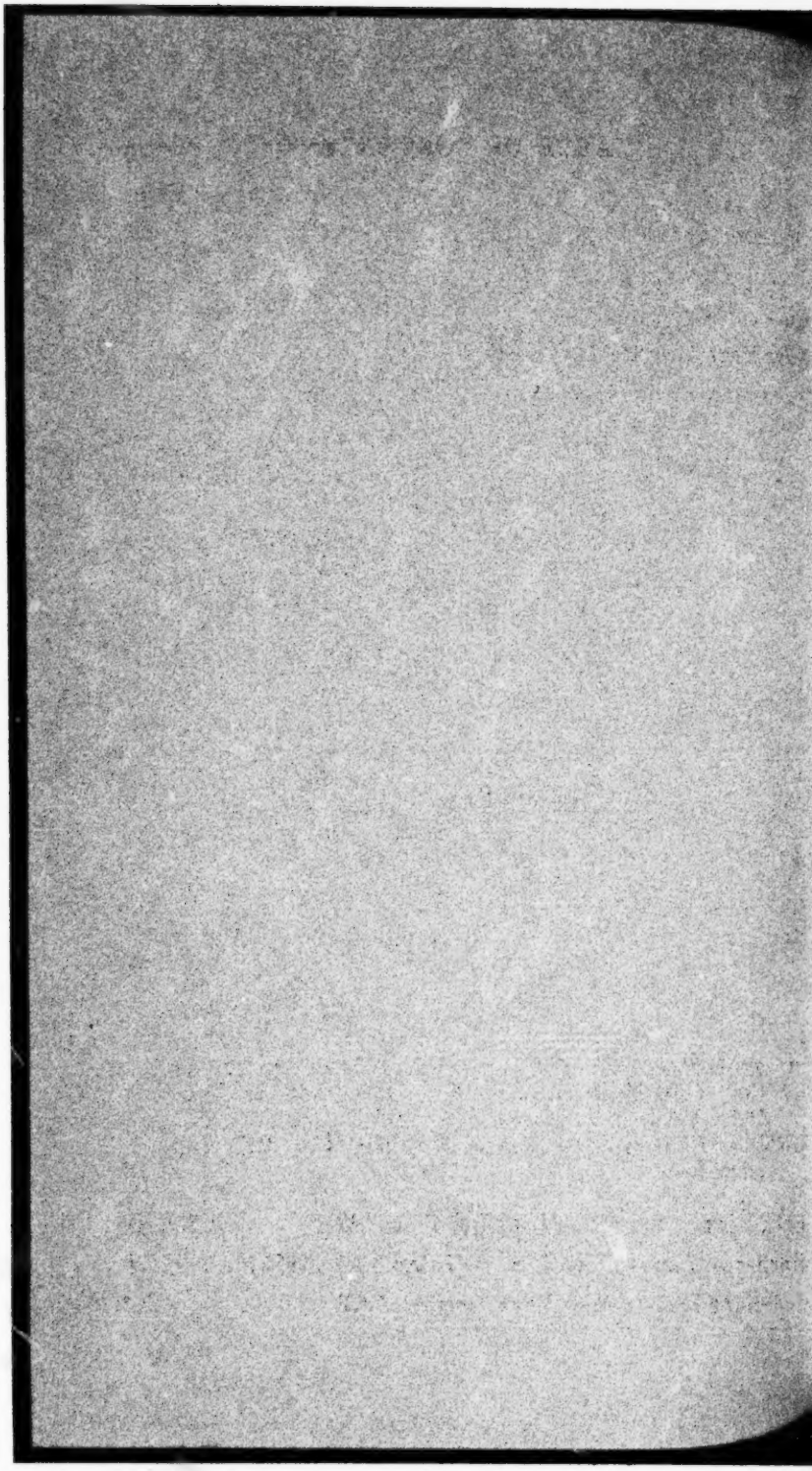

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A to Petition) is not yet reported. The opinion of the United States District Court for the Southern District of New York (A28-44) is reported at 290 F. Supp. 835.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Pursuant to a state statute authorizing a bar association to institute a criminal contempt proceeding to punish any person who unlawfully practices or assumes to practice law, respondent bar association initiated such a proceeding against petitioner. The proceeding focused on a book by petitioner which, apart from a brief criticism of the probate court system and trust and estate lawyers, consisted primarily of estate-planning legal instruments for suggested use by the reader. The state trial court found petitioner guilty of unauthorized practice and an intermediate appellate court affirmed. The highest state court reversed.

1. May petitioner recover damages from respondent in a suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for its prosecutorial role in initiating the contempt proceedings, or is such a suit barred by immunity in respondent or by the existence of probable cause for respondent's action?

NEW YORK STATUTE INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition, Section 750B of the Judiciary Law of New York, pursuant to which respondent initiated the contempt proceedings provides:

> "In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who

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unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state."

STATEMENT OF THE CASE

The petition in this case seeks reversal of lower court decisions that the nonlawyer author of a book on estate planning cannot recover damages from a bar association that, with the specific authority of state law, initiated criminal contempt proceedings to determine whether the author was guilty of the unauthorized practice of law. In that proceeding, the state trial court and intermediate appellate court held that the author was illegally practicing law; the highest state court ultimately reversed.

Petitioner Norman F. Dacey is a self-styled "professional estate planner." For a while, "he engaged in giving legal advice to clients with respect to wills, and other estate matters" in Connecticut. (A12) The Connecticut courts enjoined these activities. Mr. Dacey then published a book entitled "How To Avoid Probate!" (A29), which became a best seller. The book consisted of a few pages criticizing the probate court system, and many pages providing legal instruments such as trusts and wills, with instruction encouraging the reader to plan his own estate, without consulting a lawyer. (A13)

Respondent is a non-profit membership corporation, comprised of lawyers practicing in New York County. It has been the principal agency in New York for protecting the public against unauthorized practice of law.

The express authority given to it, and like bar associations, by the New York Judiciary Law to initiate the proceedings against unauthorized practice of law is supplemented by court rules conferring the additional power to issue process to compel attendance of witnesses. Virtually every proceeding commenced to protect the public in this area has been brought by the respondent, including proceedings to determine whether various kinds of activities constitute the unauthorized practice of law, such as legal advice by foreign lawyers, certified public accountants and others.

After an investigation, in January 1967 the bar association initiated a criminal contempt proceeding under the specific authority of Section 750B of the New York Judiciary Law to adjudge Mr. Dacey guilty of unauthorized practice of law and to enjoin those of his activities which it claimed constituted such practice. Mr. Dacey was not arrested and no preliminary relief was sought or granted.

The New York Supreme Court found Mr. Dacey guilty, fined him $250, and granted an injunction. The bar association did not enforce this order pending appeal, so no restraint was placed on Mr. Dacey's activities. (A14) While pursuing an appeal in the state courts, Mr. Dacey brought this suit in the District Court for the Southern District of New York to enjoin the state proceedings. The District Court refused to grant a preliminary injunction because Mr. Dacey made no showing of irreparable injury, failed to demonstrate a strong probability of success on the merits, and showed no reason why he could not raise his constitutional objections in the state court proceedings. (A16)

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In the state proceedings, the New York Appellate Division affirmed the judgment of the trial court by a 4 to 1 vote. The bar association continued to refrain from enforcing the injunction, which by its terms would have restrained Mr. Dacey from distributing his book within the state and from holding himself out as qualified to give legal advice on estate planning, but which also specifically provided that Mr. Dacey was not prohibited from expressing any opinion with regard to any law, procedure or legal institution. (A14) Finally, the New York Court of Appeals, with one dissent, reversed and dismissed the proceeding against Mr. Dacey. 21 N.Y. 2d 694, 287 N.Y.S. 2d 422 (1967).

Obviously heartened by this success in the state proceeding, Mr. Dacey pursued his federal suit with renewed vigor. He amended his complaint to assert a claim for $1.5 million compensatory and $4.5 million punitive damages, although the bar association of course had never attempted to enforce the state court injunction. The amended complaint pleads that the bar association sought to interfere with Mr. Dacey's right of free expression, but sets forth as the sole activity complained of the bar association's commencement of the contempt proceeding authorized by state law.

The District Court dismissed the complaint on the alternative grounds that (1) the bar association, like a public prosecutor, functioned as an officer of the court in initiating the proceeding, and therefore under the reasoning of *Pierson* v. *Ray,* 386 U.S. 547 (1967), enjoyed an absolute immunity from suit under 42 U.S.C. § 1983, or (2) the association, if not absolutely immune, was at the very least entitled to a limited

analogous to that available to a peace officer for an arrest made on the basis of probable cause.

The Court of Appeals affirmed. A majority of two judges felt that on a balancing of interests the bar association should not be granted the absolute immunity available to judges and prosecutors. But all three judges agreed with the District Court judge that the bar association could assert the defense of probable cause and that the final injunction granted by the state trial court (and affirmed by the intermediate state appellate court) provided conclusive evidence that the bar association had had probable cause to believe Mr. Dacey was guilty of the unauthorized practice of law, and to initiate the contempt proceeding authorized by state law.

ARGUMENT

The decision below that no claim lies against the bar association because it had probable cause to initiate the state proceeding complained of was plainly correct. Mr. Dacey's argument that the probable-cause defense should not be available under Section 1983 was rejected by this Court only a few years ago. There is no reason to reconsider *Pierson* v. *Ray*, 386 U.S. 547 (1967), which was unanimous on that point. That is particularly true with regard to this case involving the institution of a judicial proceeding specifically authorized by a state statute. There was no arrest or imprisonment. The bar association did not even attempt to enforce the final injunction granted by the state trial court.

The question of what may constitute probable cause has been long established at common law. As all judges below agreed without difficulty, the entry of a final judgment against the petitioner in the state

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court proceeding and its affirmance by an appellate court was conclusive evidence in law and in common sense of the existence of probable cause for the initiation of the proceeding, notwithstanding subsequent reversal. This is a settled principle on which petitioner shows no conflict among the authorities. The probable cause conclusion was further buttressed by the Connecticut court proceedings and the District Court's refusal to grant a preliminary injunction in this case.*

I. The Recognition Below of the Defense of Probable Cause Was Plainly Correct

Mr. Dacey's brief in the Court of Appeals conceded that the defense of "probable cause is available to a defendant" (p. 15). Now, however, he argues that "if the traditional defense of probable cause is made available in actions brought pursuant to the Civil Rights Act," alleged wrongdoing will go unpunished. This Court made clear in its 1967 decision in *Pierson* v. *Ray*, 386 U.S. 547 (1967), that the Civil Rights Act did not change common-law rules concerning the immunity of public officials or available defenses. The Court specifically held that the defense of probable cause, "which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983." *Id.* at 557.

The courts below correctly concluded that the strong public interest in protecting against unauthorized prac-

* Review of the dismissal would require consideration of the further issue of respondent's absolute immunity for its action as part of the judicial process which respondent urged below and would be entitled to continue to urge. See *Langnes* v. *Green*, 282 U.S. 531, 537-38 (1931); *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937).

tice of law requires that respondent have immunity if there was probable cause. Any other rule would prevent vigorous enforcement of desirable laws. Excessive timidity in law enforcement would limit prosecutions to cases where the violation was clear beyond all doubt, and thereby prevent the clarification of the law which only litigation of close questions can provide.

In urging that the traditional defense of probable cause should not apply where the alleged wrong derives from a criminal proceeding, petitioner overlooks the fact that these rules developed in the law of malicious prosecution which related to criminal proceedings only. *E.g.*, HARPER & JAMES, THE LAW OF TORTS § 4.1 (1956).

That leaves only the question of what constitutes probable cause—which is neither novel nor uncertain. In accord with common-law principles and the precedent of this Court, the courts below properly held that the final judgment of the state trial court conclusively established probable cause. *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U.S. 141 (1887); *see also Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 104 F. 2d 105 (2d Cir.), *cert. denied*, 308 U.S. 599 (1939). This is a rule well rooted in fairness and logic.

Moreover, the forceful further indicia of probable cause in this case make it an inappropriate one for this Court to reconsider the rule of *Crescent City Live Stock Co.* if it were otherwise so inclined. Regardless of whether success at the trial court level should conclusively demonstrate probable cause, an affirmance by an appellate court certainly should. Moreover, the allegations of Mr. Dacey's own complaint demonstrate that his activities presented a fair question of

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unauthorized practice. As the amended complaint stated, the book sets forth "ways and means" of avoiding lawyers and probate and "contains various forms and explanatory material dealing with decedent's estates and lifetime trusts" (A18). The complaint also alleges that the bar association was attempting to prevent Mr. Dacey from competing with its members in "advising the public as to the nature and means of the probate law and courts and tools and devices available to the public to avoid or properly use the probate law and probate courts" (A24). The petitioner cannot consistently accuse the bar association of exclusionary tactics and at the same time argue that there was not even probable cause to believe he was intruding into its territory, the practice of law.

In addition petitioner had previously engaged in "giving legal advice to clients" on estate matters in Connecticut which caused the Connecticut courts to enjoin him. And on his injunction application in the District Court, though given ample opportunity, he was unable to convince the District Court that there was no probable cause for the state proceedings. These matters alone would warrant dismissal of petitioner's claim on the ground of probable cause without any need to reach the question of the effect of the actual conviction and the affirmance. *E.g., Burt* v. *Smith,* 181 N.Y. 1, 73 N.E. 495 ( ), *appeal dismissed,* 203 U.S. 129 (1906).

Petitioner's reliance on *Pierson* v. *Ray* to justify reexamination of the existence of probable cause is misplaced. The key factor in that case with respect to all defendants other than the judge (i.e., the arresting officers), was that they had imposed actual restraint on plaintiffs by arrest and had done so *ex parte*

before any judicial proceedings. Accordingly, plaintiffs were held entitled to a trial against these defendants despite the plaintiffs' previous conviction for breach of the peace by a municipal police justice (not a court of general jurisdiction) because there were factual issues as to the probable cause for the restraint imposed on plaintiffs by the out-of-court act of arrest. Here respondent imposed no restraint on petitioner by arrest nor did it proceed by any *ex parte* action.

Here the issue is the reasonable basis for a judicial proceeding and not for a separate out-of-court act, and the appropriate analogy is to the law of malicious prosecution and not the law of false arrest. As all judges below agreed:

> "Since this case involved no ex parte restraint on [petitioner's] liberty we find the analogy to malicious prosecution far more compelling than any analogy to false arrest." (14A)

The judicial proceeding against petitioner was not a frivolous one. It involved the striking of a balance between the public's right to be protected against the unauthorized practice of law and the constitutional guarantees of the First Amendment. This Court has looked carefully at state programs regulating the practice of law that may impinge upon protected speech. In doing so, however, it has recognized "that the states have broad powers to regulate the practice of law." *UNW* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *accord Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 6 (1964); *see also Hackin* v. *Arizona*, 389 U.S. 143 (1967).

II. Petitioner's Claim Is Contrary to the Intent of the Civil Rights Act and the First Amendment

The purpose of the Civil Rights Act of 1871 was to discourage lawless conduct, not to inhibit the use of the courts with all the safeguards surrounding our judicial system. It was intended to provide a federal remedy to victims of lawlessness, political suppression or violence perpetrated outside the judicial process, especially those acts perpetrated by the Ku Klux Klan which were primarily responsible for the turmoil leading to the Act's passage. *See Monroe* v. *Pape,* 365 U.S. 167, 174 (1961). The Act was not intended to inhibit persons from presenting matters to a court for resolution or from arguing their cause before the court. All the bar association did here, and the only thing the bar association did here, was to initiate a judicial proceeding.

In this case the bar association obeyed the spirit of the Civil Rights Act and the specific mandate of state law in prosecuting Mr. Dacey in court. As petitioner he presents no reason why the bar association should be denied not only the absolute immunity from suit of a judicial officer but also the limited immunity for action based on probable cause extended to peace officers in suits for false arrest and private litigants in suits for malicious prosecution. If the First Amendment protects Mr. Dacey's right to practice law through publication, the same principles of free expression should, far from requiring that the bar association be stripped of all common law immunities and defenses, protect it in its resort to the courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 8, 1970

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